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A

Beldeu Singh v Dr Kenneth Andrew

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–747 OF 2002
LOW HOP BING, ABU SAMAH AND SULAIMAN DAUD JJCA
9 JULY 2009

C

Civil Procedure — Appeal — Fact, finding of — Interference by appellate court — Judicial appreciation of evidence — Sharply conflicting versions in evidence adduced for both parties — Whether trial judge's acceptance of defendant's version and rejection of plaintiff's version constituted a misdirection as to warrant appellate interference — Audio visual advantage of trial judge in seeing, hearing and assessing witnesses — Wheter there was reason for appellate interference

D

The plaintiff claimed that he was introduced to the defendant some time between 26 and 29 July 1993 at the lobby of the Shangri-la Hotel, Kuala Lumpur, where the defendant mentioned the Real Estate Investment Trust ('REIT') to the plaintiff and asked the plaintiff to find investors for the REIT. The plaintiff averred that the defendant had agreed to pay him certain commissions for finding investors. The defendant however denied any agreement to pay the plaintiff the alleged commission. The defendant claimed that his first meeting with the plaintiff was at PW3's office and not at the Shangri-la Hotel. After hearing, assessing and considering the evidence adduced by both parties, the learned trial judge accepted the defendant's version and held, on a balance of probabilities, that the plaintiff had failed to establish his case against the defendant. The plaintiff appealed claiming that the learned judge had misjudged the credibility of the plaintiff's witnesses. The question arising for determination in this appeal was: 'Given the two sharply conflicting versions in the evidence adduced respectively for the plaintiff and the defendant, did the learned trial judge's acceptance of the defendant's version and the rejection of the plaintiff's version constitute such a misdirection as to warrant appellate interference?'

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Held, dismissing the appeal with costs:

(1) It is the duty of the learned trial judge to assess and consider the evidence in order to accept one version and reject the other. An appellate court does not have the audio visual advantage which the trial court has, in seeing, hearing and assessing the witnesses at the trial. Hence, an appellate court is not likely to reverse or depart from the trial judge's finding save where he has misdirected himself (see para's 17–18): *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 referred; *Industrial*

I

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Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332 referred; *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* [2006] 5 CLJ 307 (HC) referred.

(2) The learned trial judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced at the trial, and assessed, weighed and, for good reasons, accepted the evidence adduced for the defendant as credible. There was nothing plainly wrong here and there was no reason for the Federal Court to resort to appellate interference. Hence, the question posed was answered in the negative (see para's 19–20).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa dia diperkenalkan kepada defendan pada kira-kira antara 26 dan 29 Julai 1993 di lobi Hotel Shangri-la, Kuala Lumpur, di mana defendan menyebut mengenai Real Estate Investment Trust ('REIT') kepada plaintif dan menyuruh plaintif mencari pelabur untuk REIT. Plaintif menegaskan bahawa defendan telah bersetuju untuk membayar dia komisen tertentu kerana mendapatkan pelabur-pelabur. Defendan walau bagaimanapun menafikan apa-apa perjanjian untuk membayar plaintif komisen yang didakwa tersebut. Defendan mendakwa bahawa mesyuarat pertamanya dengan plaintif adalah di pejabat PW3 dan bukan di Hotel Shangri-la. Selepas mendengar, menaksir dan mempertimbangkan keterangan yang dikemukakan oleh kedua-dua pihak, hakim bicara yang bijaksana menerima versi defendan dan memutuskan, atas imbangan kebarangkalian, bahawa plaintif gagal untuk membuktikan kesnya terhadap defendan. Plaintif merayu dengan mendakwa bahawa hakim yang bijaksana telah menyalah anggap kredibiliti saksi-saksi plaintif. Soalan berbangkit untuk penentuan dalam rayuan ini adalah: 'Given the two sharply conflicting versions in the evidence adduced respectively for the plaintiff and the defendant, did the learned trial judge's acceptance of the defendant's version and the rejection of the plaintiff's version constitute such a misdirection as to warrant appellate interference?'

Diputuskan, menolak rayuan dengan kos:

(1) Ia adalah tugas hakim bicara yang bijaksana untuk menaksir dan mempertimbangkan keterangan untuk menerima satu versi dan menolak yang lagi satu. Mahkamah rayuan tidak mempunyai kelebihan audio visual sepertimana yang dinikmati oleh mahkamah bicara dalam melihat, mendengar dan menaksir saksi-saksi pada masa perbicaraan. Maka, mahkamah rayuan tidak mungkin menterbalikkan atau menyimpang daripada dapatan hakim bicara kecuali di mana dia tersalah arah dirinya (lihat perenggan 17–18): *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 dirujuk; *Industrial Concrete Products Bhd v Concrete*

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Engineering Products Bhd [2001] 2 MLJ 332 dirujuk; *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* [2006] 5 CLJ 307 (HC) dirujuk.

(2) Hakim bicara yang bijaksana telah memulakan dengan teliti ke atas pemahaman dan penaksiran kehakiman yang teliti terhadap keterangan yang dikemukakan semasa perbicaraan, dan menaksir, menimbang dan, untuk sebab-sebab yang baik, menerima keterangan yang dikemukakan untuk defendan sebagai boleh dipercayai. Tiada apa yang jelas silap di sini dan tidak terdapat alasan untuk Makamah Persekutuan menggunakan campur tangan mahkamah rayuan. Maka, persoalan yang diutarakan dijawab dalam negatif (lihat perenggan 19–20).]

Notes

For cases on finding of facts, see 2(1) Mallal's Digest (4th Ed, 2010 Reissue) paras 999–1117.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formely known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41, PC (refd)
Eu Boon Yeap & Ors v Ewe Kean Hoe [2008] 2 MLJ 868; [2008] 1 AMR 1042, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 ; [2004] 6 AMR 681, FC (refd)
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 AMR 357, CA (refd)
Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor [2004] 3 MLJ 249; [2006] 5 CLJ 307, HC (refd)
Owners of Steamship Hontestroom v Owners of Steamship Sagaporack [1927] AC 37, HL (refd)
Powell and Wife v Streatham Manor Nursing Home [1935] AC 243, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Appeal from: Suit no (S6) S1–22–356 of 1995 (High Court, Kuala Lumpur)

Haris Ibrahim (Neoh Hor Kee and Karamjit Kaur with him) (H Karamjit & Co) for the appellant.
Trevor George de Silva (Lee Ong & Kandiah) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] Parties are referred to in their capacities in the High Court.

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[2] On 29 August 2002, the Kuala Lumpur High Court dismissed with costs the plaintiff's claim for £122,500 against the defendant. The plaintiff has now appealed to this court.

[3] In the instant appeal, it is necessary for us to examine two conflicting versions of the evidence adduced at the trial, and the view of the learned trial judge relating thereto.

THE PLAINTIFF'S VERSION

[4] The plaintiff was introduced to the defendant some time between 26 and 29 July 1993 by one Dr Paul Temporal (PW3), at the lobby of the Shangri-la Hotel, Kuala Lumpur, where the defendant mentioned the Real Estate Investment Trust (REIT) to the plaintiff and asked the plaintiff to find investors for the REIT. The plaintiff told the defendant that he ('the plaintiff') would try. The plaintiff added that he would require a commission based on 2.5% of the funds placed in the REIT and an additional 0.5% annual fee for the duration of utilisation of the funds by the REIT. The plaintiff said that the defendant had agreed to this suggestion, except that for the 0.5% annual fee, which the defendant would revert to the plaintiff later. Meanwhile, the defendant would send the plaintiff more information on the REIT. The defendant did so a week later, by sending the plaintiff a two-page information. The plaintiff then testified that he had secured an investment of USD5,000,000 (£3.5m) before the end of October 1993. The learned trial judge found that the plaintiff's evidence that he would require a commission of 2.5% was contrary to para 3 of his statement of claim in which the plaintiff averred that 'the defendant proposed a commission of 2.5% on funds procured for the Real Estate Investment Trust (REIT) in the United Kingdom to the plaintiff'.

[5] The plaintiff's evidence then touched on the demand for payment of the commission vide his solicitor's letters dated 4 August, 19 September and 4 October 1994 addressed to BW Corporate Finance Ltd (BWCF) in London. In response to the plaintiff's said letters of demand, BWCF's solicitors replied and denied having entered into any agreement with the plaintiff and rejected the plaintiff's claim. Upon BWCF's denial and rejection, the plaintiff then made a demand on the defendant. The learned trial judge had evaluated the plaintiff's evidence in this regard and held that the plaintiff's demand on the defendant was 'an afterthought contrived by him when faced with the documentary evidence staked against him'.

[6] In relation to the additional 1% commission, the plaintiff had testified in the previous proceedings in the same action before another High Court judge, that '(For the) fund from Germany in London after 31 October 1993, I am not

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entitled to additional commission of 1%', and that the funds were deposited in the United Kingdom on 12 November 1993 ie after 31 October 1993. The plaintiff reaffirmed this self-defeating evidence in subsequent proceedings in the same action, before the instant High Court judge who therefore found that by the plaintiff's own evidence, the plaintiff has failed to prove that there was in fact an agreement between the plaintiff and the defendant relating to the commission and that, in any event, the funds were deposited well after the end of October 1993.

[7] PW3 testified for the plaintiff that the defendant had not entered into any agreement of any kind in respect of payment of fees to Beldeu Singh, but later contradicted himself when he said that this 'does not change in any way my conviction that the defendant and the plaintiff had entered into an agreement regarding REIT Commission'. On the basis of PW3's own contradiction, the learned trial judge found that 'In the circumstances, the evidence of PW3 in this regard is highly questionable'.

THE DEFENDANT'S VERSION

[8] In the statement of defence, the defendant denied any agreement to pay the plaintiff the alleged 2.5% commission and the additional 1% commission regarding the placement of funds in the REIT.

[9] The defendant testified that his first meeting with the plaintiff was at PW3's office and not at the Shangri-la Hotel. The defendant was introduced to the plaintiff by PW3. Because of the plaintiff's position in Arab-Malaysian Eagle Assurance Bhd ('AMEAB'), the defendant was considering AMEAB for the REIT. The defendant felt that it was wrong to offer the commission to the plaintiff. The relevant evidence of the defendant reads as follows:

> At no time did I ever propose paying a commission to the Plaintiff. At no time in July 1993 did the Plaintiff ask for a commission. I am cautious in my dealings with people and would not enter into any business arrangement on a rushed 30 minutes acquaintance especially if that person, like the Plaintiff, is an employee of a company and would possibly be putting himself in a position of conflict.

[10] The defendant then met other senior officers of AMEAB to whom he proposed the investment in the REIT. Through AMEAB's general manager, Encik Amarudin bin Tajudin (PW2), a meeting was arranged between the defendant and three other persons viz the Chairman of AMEAB, PW3 and one Dato' Azlan.

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[11] The defendant tendered as evidence his facsimile dated 17 August 1993 to PW3 in which he stated, inter alia, that the REIT was to be used for AMEAB. In another facsimile, dated 22 August 1993, to PW3, the defendant stated, inter alia, that there was no question of any fee being paid to the plaintiff. The second fax followed the meeting between the plaintiff and the defendant in London on the same date. When cross-examined, PW3 admitted having received this fax, and did not at any time question its content.

[12] The defendant also testified that he did not owe Beldeu Singh any money and had never entered into any agreement directly or indirectly with the defendant; and that no contract ever existed between them.

FINDING OF THE HIGH COURT

[13] After hearing, assessing and considering the evidence adduced by the plaintiff and the defendant and having regard to the parties' pleadings, contemporaneous documents and records, the learned trial judge accepted the defendant's version and held, on a balance of probabilities, that the plaintiff had failed to establish his case against the defendant.

ANY MISDIRECTION?

[14] Learned counsel Mr Haris Ibrahim (assisted by Mr Neoh Hor Kee and Ms Karamjit Kaur) argued that the High Court had misjudged the credibility of the plaintiff's witnesses and that would justify appellate interference.

[15] Mr Trevor George de Silva of counsel for the respondent urged this court to refrain from any interference, especially in matters arising from finding of facts.

[16] After considering the aforesaid submissions and the finding of the learned trial judge, the elementary question for determination in the instant appeal may be identified as follows:

> Given the two sharply conflicting versions in the evidence adduced respectively for the plaintiff and the defendant, does the learned trial judge's acceptance of the defendant's version and the rejection of the plaintiff's version constitute such a misdirection as to warrant appellate interference?

[17] In the light of the aforesaid backdrop, it is the duty of the learned trial judge to assess and consider the evidence in order to accept one version and

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reject the other. This is consistent with the salutary approach set out by Chang Min Tat FJ (as he then was) for the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case, and that plausibility should never be mistaken for veracity. This approach was applied by James Foong J (now FCJ) in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 at p 349-H and by me in *Nuri Asia Sdn Bhd v Fossis Corp Sdn Bhd & Anor* [2006] 3 MLJ 249; [2006] 5 CLJ 307 (HC).

[18] We are mindful of the fact that an appellate court does not have the audio visual advantage which the trial court has, in seeing, hearing and assessing the witnesses at the trial. Hence, an appellate court is not likely to reverse or depart from the trial judge's finding save where he has misdirected himself: see eg *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack* [1927] AC 37, 47 (HL); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formely known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, 527E, 527I and 528A–B (FC); *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243 at p 250 (HL) which was followed in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at p 42 (PC).

[19] We find that the learned trial judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced at the trial, and assessed, weighed and, for good reasons, accepted the evidence adduced for the defendant as credible. There is nothing plainly wrong here, and there is no reason for us to resort to appellate interference: see *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868; [2008] 1 AMR 1042 (CA); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 AMR 357 (CA); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 681 (FC).

CONCLUSION

[20] In the circumstances, the answer to the above question is in the negative. We hold that the plaintiff's appeal is devoid of merits. It is dismissed with costs. The decision of the High Court is affirmed. Deposit to the defendant on account of the costs.

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Appeal dismissed with costs.

Reported by Kanesh Sundrum